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## Legal Summaries

Oscar Gutierrez

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## **Pepperdine University School of Law Legal Summaries \***

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\* Prepared by Oscar Gutierrez, the Legal Summaries Editor of the Journal of the National Association of Administrative Law Judiciary at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

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**UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA**

**Ark. Dairy Coop. Ass'n., Inc v. U.S. Dep't of Agric.**, 573 F.3d 815 (D.C. Cir. 2009).

**LAW**: Per 7 U.S.C. § 608c(5), the Secretary of Agriculture (Secretary) establishes formulas to calculate the minimum prices that dairy handlers (processors, manufacturers, and distributors) must pay dairy farmers (Producers) for milk. As part of those formulas, the Secretary sets “make allowances,” which represent the costs to handlers in making certain forms of dairy products.

**FACTS**: In July 2008, the Secretary promulgated an “Interim Rule” amending milk marketing orders to increase make allowances, thus reducing the minimum price paid to the Producers. Several Producers and producer cooperatives challenged the increases, principally on the ground that the Secretary had failed to determine and consider their food and fuel costs, which they maintain was required by the 2008 amendment to Agricultural Marketing Agreement Act (AMAA), 7 U.S.C. §§ 601-74. The district court ruled that the Producers lacked standing for want of a cause of action and, alternatively, denied their motion for a preliminary injunction. The Producers appealed, contending they had demonstrated their entitlement to a preliminary injunction. They further contended they had demonstrated irreparable harm and that an injunction in their favor was in line with the public interest in preventing unauthorized administrative action and direct injury to them.

**ANALYSIS**: Preliminarily, the court found that the Producers could bring suit under the Administrative Procedure Act (APA) to challenge the Interim Rule, which directly affected their profits because make allowances were increased. The Producers were qualified to bring suit because they were aggrieved, within the meaning of the APA, by the alleged diminution of their personal rights secured under the AMAA, the Interim Rule they challenged constituted final agency action, and they sought non-monetary injunctive relief. The court then turned to the merits of the Producers’ contention that the Secretary was statutorily required to determine and consider the Producers’ feed and fuel costs in seeking to change the amount of the make allowance. However, the

Producers failed to show a likelihood of success in seeking to enjoin the Interim Rule. Specifically, the Producers were unable to show prejudice as a result of the Secretary using old or incorrect figures and agricultural prices, as was alleged. Conversely, the Secretary complied with his duties by using up-to-date data in compiling figures and taking official notice of the most recent agricultural prices available at the time in computing the make allowances.

**HOLDING:** Although the Producers did have standing to challenge the interim rule under the APA and the Secretary was obliged under the AMAA to consider their feed and fuel costs, the Producers failed to show a likelihood of success on the merits. As a result, this court did not need to balance the remaining factors. The court affirmed the denial of the preliminary injunction.

**IMPACT:** The court used this decision to even out the profit margins between the handlers and the Producers. Although the Secretary did increase make allowances -- thereby decreasing the amount received by the Producers -- the Secretary reasoned that this was necessary in order to help offset the increases in the manufacturing costs incurred by the handlers. Also, the Secretary reasoned that the reduced profits collected by Producers could be recouped through market mechanisms. The make allowances were the only mechanism through which the handlers could recoup their costs under the current pricing formula.

**Cohen v. United States**, 578 F.3d 1 (D.C. Cir. Aug. 7, 2009).

**LAW:** On May 26, 2006, the Internal Revenue Service (IRS) issued Notice 2006-50 (Notice). The Notice announced the discontinuation of the excise tax for phone charges based solely on transmission time and detailed the refund process for taxes erroneously collected between February 28, 2003 and August 1, 2006. Under the Notice, individual taxpayers had to request their refund or credit on their 2006 federal income tax returns. Taxpayers could either request a “safe harbor” amount, which required no documentation, or the actual amount of tax they paid, for which the IRS could demand documentation. It makes clear that taxpayers cannot seek administrative refunds in any other matter.

**FACTS:** The Notice gave taxpayers the right not to pay excise taxes on phone calls for which the charges vary based only on transmission time, and not with distance. After the Notice, various lawsuits arose challenging the refund process. The district court dismissed the cases after concluding that taxpayers (Appellants) failed to exhaust their administrative remedies for their refund claims and failed to make valid claims under federal law, including the Administrative Procedure Act (APA), 5 U.S.C. § 702. The district court also ruled that their claims for injunctive and declaratory relief were mooted by the IRS's decision to discontinue the tax on time-based phone charges. On appeal, Appellants asked the Court to strike down the IRS's refund regime under the Notice as unlawful, or alternatively, to remand the issue to the district court.

The case also involved the situation of one specific individual, Cohen. Pursuant to 26 U.S.C. § 6532, taxpayers cannot file suit to recover taxes until six months after filing a valid refund claim with the IRS unless the Secretary renders a decision within that time frame. In November 2005, Cohen filed a refund claim for excise taxes he paid in 2004 and 2005. He received a letter from the IRS, dated December 20, 2005, stating they had received his claim but had not resolved it, as they had not completed the research needed to give him a correct response, and that the IRS would contact him within forty-five days. Cohen received a second letter from the IRS dated January 4, 2006, informing him that the IRS was not able to process his claim because the tax was the subject of current litigation, and that he would be contacted when the situation was resolved. Cohen concluded that the January 4, 2006 letter he received from the IRS communicated the IRS's decision not to voluntarily return his money and thus triggered his right to sue. On appeal, Cohen contended that the district court erred by dismissing his refund claim for a lack of subject matter jurisdiction on the grounds that he filed suit prematurely.

**ANALYSIS:** "[T]he IRS unlawfully expropriated billions of dollars from taxpayers . . . and developed a mandatory process as the sole avenue by which the agency would consider refunding its ill-gotten gains." Additionally, Appellants were barred from pursuing their refunds in court by virtue of the fact that they did not exhaust their administrative remedies under the only available avenue -- Notice 2006-50. Consequently, Appellants sought to challenge these

procedural obstacles the IRS inserted between individual taxpayers and their right to file suit to recover unlawfully collected taxes. The court stated, in no uncertain terms, that the “IRS [could not] avoid judicial review of that process by simply designating it a policy statement[.]” and that “[the Notice] constituted a final agency action that aggrieved taxpayers by hindering their access to court.” Accordingly, the court reversed the district court and remanded Appellants’ APA claims for further consideration.

As for Cohen, contrary to his reasoning, the January 2006 letter merely communicated that the IRS was not going to take any action at that point because the tax was currently the subject of litigation. The IRS did not refuse to accept Cohen’s claim. Rather, the letter informed him as to why his claim had not yet been processed and invited him to contact the IRS with any questions. Cohen relied on his own misinterpretation of the letter’s meaning. Accordingly, Cohen’s refund claim was deemed premature and the district court rightly concluded it lacked subject-matter jurisdiction.

**HOLDING:** The court reversed the dismissal of Appellants’ APA claims, but affirmed the dismissal of Cohen’s refund claim.

**IMPACT:** This case signals a change in the way revenues are collected via taxation. The advent of cellular phones has changed the way Americans communicate, and has thus changed the methods in which the IRS can tax phone companies. Though the IRS was forced to return the excess taxes it collected, it is likely that it will develop new methods to tax Americans on their use of cellular phones on a new system that coincides with the Notice.

#### UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

**Joseph v. Holder**, 579 F.3d 827 (7th Cir. Aug. 27, 2009).

**LAW:** Under 8 C.F.R. § 1003.2(c)(3)(ii), time limits do not apply to a motion to reopen to:

[A]pply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is

material and was not available and could not have been discovered or presented at the previous hearing.

**FACTS:** At the time of this asylum hearing, Roome Joseph was a twenty-eight-year-old woman who came to the United States from Pakistan in 1998 with her parents and two brothers. Her father went back to Pakistan in 1999, and her mother and brothers returned to Pakistan in 2005. Joseph married an American man in 2004, whom she later divorced. Her family strongly disapproved of her marriage, and her father informed her that he had arranged for her to marry a Pakistani man upon her return to Pakistan. As a result, Joseph feared that her family would disown her if she refused, consequently forcing her to live as a single woman in Pakistan. Joseph went so far as to submit evidence that Christian women in Pakistan, abandoned by their families, often face a life of prostitution, violence, and death. On June 26, 2006, Joseph filed a motion to reopen her asylum proceedings. Pursuant to 8 C.F.R. § 1003.2(c)(2), such motions “must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.” Joseph acknowledged that her motion was untimely, but was convinced that she could demonstrate “changed circumstances” that would exempt her from the time requirements. The Board of Immigration Appeals (BIA) denied her motion, but the court granted Joseph’s petition for review and remanded to the BIA because it failed to consider her argument that her parents’ threat of forced marriage constituted a changed circumstance in Pakistan. On remand, the BIA again denied her motion to reopen, and Joseph again petitioned the court for review. Her main contentions were that the BIA failed to consider her arguments, misconstrued relevant legal standards, and misinterpreted 8 C.F.R. § 1003.2(c)(3)(ii), which creates the relevant exception for the filing of an untimely motion to reopen.

**ANALYSIS:** The regulation on which Joseph’s case turned requires “changed circumstances arising in the country of nationality.” Nowhere does the statute mandate a narrower requirement, such as a “dramatic change” that the BIA seemed to require. Rather, the statute only requires (1) that there be changed circumstances; (2) that the circumstances be material; and (3) that the evidence showing changed circumstances “was not available and



could not have been discovered or presented at the previous hearing.” The plain language of the regulation also does not limit the concept of “changed circumstances” to some kind of broad social or political change in the country, such as a new governing party. Joseph sufficiently displayed a changed circumstance. For example, if she had returned home to Pakistan, she would have faced several potential hardships: a would-be suitor who might have abducted her and forced her to marry in Pakistan, a hostile family that might physically abuse her, or live in a country in which she would have faced severe harassment - possibly rising to the level of persecution to which the authorities would turn a blind eye - as a single woman with no familial support.

**HOLDING:** The BIA committed legal error in adopting an overly narrow interpretation of 8 C.F.R. § 1003.2(c)(3)(ii) that runs counter to the plain language of the regulation. The Court granted the petition for review and remanded to the BIA to consider all of Joseph’s arguments about the changed circumstances she would face in Pakistan.

**IMPACT:** The Court’s decision used a strict interpretation of the statute to arrive at its decision. Although the previous BIA decisions seemed to require a dramatic change, this court looked at the statute on its face and found that Joseph was to encounter hardship if she were to return to her native country. The decision ensures that “changed circumstances” will be looked at flexibly, and not as a rigid concept.

**Terry v. Astrue**, 580 F.3d 471 (7th Cir. Aug. 28, 2009).

**LAW:** 20 C.F.R. § 404.1519o(b) provides that in Social Security matters, Administrative Law Judges (ALJs) “will not make determinations and decisions without a properly signed report” and “will not use an unsigned or improperly signed consultative examination report to make the determinations or decisions.” Also, when a “properly signed consultative examination report” is required “to make these determinations or decisions,” the ALJ must obtain said report(s).

**FACTS:** Lotresia Terry applied for disability insurance benefits (DIB) and supplemental security income (SSI), asserting that she was

unable to work because she suffered from a rash of medical ailments, including depression, fibromyalgia, hypertension, pelvic floor disorder, hematuria (blood in her urine), and severe back pain following spinal fusion surgery. After her claim was administratively denied, an ALJ reviewed her claim and concluded that Terry's impairments did not render her disabled. The ALJ reasoned that although the limitations prevented her from returning to her previous job as a certified nurse's assistant, Terry still retained the capacity to perform simple, unskilled work at the sedentary exertional level with the option to stand for one to two minutes every one-half hour. Terry then asked the Social Security Appeals Council to reconsider the ALJ's determination in light of new evidence that documented her treatment for depression during the spring of 2007. The Appeals Council denied the request. The district court held that the ALJ's decision was supported by substantial evidence. Terry appealed.

**ANALYSIS:** This case turned on an unsigned, undated residual functional capacity (RFC) form from the state agency which concluded that Terry could perform work at the sedentary level. The RFC form stated that Terry "could occasionally lift ten pounds, frequently lift less than ten pounds, stand or walk at least two hours in an eight-hour workday, and sit for six hours in an eight-hour workday." However, 20 C.F.R. § 404.1519o(b) provides that an unsigned examination report may not be used to deny benefits. Once the unsigned report was thrown out, no other evidence supported the ALJ's conclusion that Terry could perform sedentary work, as none of the other documents stated that she was capable of performing such work. Second, the ALJ's opinion failed to even mention Terry's pelvic floor and urinary disorders – impairments that must be considered in determining whether or not an applicant is disabled. The court completely ignored the reasoning from *Villano v. Astrue*, 556 F.3d 558, 563 (7th Cir. 2009), which found that ALJs must consider the combined effects of all of the claimant's impairments, even those that would not be considered severe in isolation. Lastly, the ALJ failed to support his conclusion that Terry's testimony was not credible. The ALJ repeatedly mischaracterized the record by identifying purported "inconsistencies" in Terry's testimony. The court, relying on *Ribaudo v. Barnhardt*, 458 F.3d 580, 584-85 (7th Cir. 2002), held that the ALJ's adverse credibility determination was

not supported by the record and that, on remand, the agency must reassess Terry's credibility in light of all evidence presented.

**HOLDING:** Because the ALJ relied on an unsigned medical report that should have been excluded from the record, failed to consider all of Terry's impairments, and erroneously found her not credible, the court remanded the case to the agency.

**IMPACT:** The initial ALJ who ruled against Terry, along with the district court, failed to follow the letter and spirit of the law. The black letter law states that one may not rely on unsigned medical reports in rulings. However, the report that was relied upon most heavily in ruling against Terry was one that was unsigned. Fortunately for Terry, she appealed the decision and won.

#### UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

**BNSF Ry. Co. v. O'Dea**, 572 F.3d 785 (9th Cir. 2009).

**LAW:** Section 2-4-702(2)(a) of the Montana Code declares that a petition for review "must be filed in the [state] district court for the county where the petitioner resides or has the petitioner's principal place of business or where the agency maintains its principal office."

**FACTS:** Matt O'Dea, a citizen of Montana, applied to and was extended a conditional offer of employment for the position of Conductor Trainee by BNSF Railway Company, a Delaware corporation with its principal place of business in Texas. However, after an individualized medical assessment, BNSF disqualified O'Dea from further consideration for the position. O'Dea subsequently filed a complaint of discrimination with the Montana Department of Labor and Industry, Employment Relations Division, alleging that BNSF discriminated against him because of the perceived disability of obesity. O'Dea claimed that the alleged discrimination violated the Montana Human Rights Act, the Americans with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964. A hearing examiner granted O'Dea's motion for summary ruling on liability and issued a final decision awarding him damages and other relief. The Montana Human Rights Commission affirmed that decision. After BNSF filed a federal action based upon

diversity jurisdiction, O'Dea filed a motion to dismiss the action, arguing that the federal courts lacked subject matter jurisdiction because federal courts do not have diversity jurisdiction over appeals from state agencies. The district court agreed, dismissing the action. This appeal followed.

**ANALYSIS:** The court relied heavily upon its decision in *Shamrock Motors, Inc. v. Ford Motor Co.*, 120 F.3d 196 (9th Cir. 1997) in formulating its opinion. In *Shamrock*, this court held that federal courts do not have jurisdiction to review decisions of Montana Administrative agencies where the review is of an on-the-record rather than de novo nature. In the instant case, the court held that a state cannot confer rights upon private parties and require that litigation between those parties be confined to the courts of the state itself. Additionally, the court held that in determining jurisdiction, the district courts of the United States must look to the sources of their power - Article III of the United States Constitution and Congressional statutory grants of jurisdiction - and not to the acts of state legislatures. Simply put, the states have no power directly to enlarge or contract federal jurisdiction.

**HOLDING:** Even though the case involved the on-the-record review of a Montana administrative agency decision, the district court still retained diversity jurisdiction.

**IMPACT:** The decision effectively terminated *Shamrock's* influence, as the court held that the district court did have subject matter jurisdiction to hear BNSF's review action. The decision of the court bestowed additional powers on the federal court system to decide matters of diversity jurisdiction.

**Pub. Citizen v. Nuclear Regulatory Comm'n**, 573 F.3d 916 (9th Cir. 2009).

**LAW:** Under 42 U.S.C. § 2232(a), when licensing nuclear facilities, the Nuclear Regulatory Commission (Commission) is "charged with ensuring that the operation of those facilities is 'in accord with the common defense and security and will provide adequate protection to the health and safety of the public.'"

**FACTS:** Public Citizen (Petitioners) challenge the Commission's modification of the Design Basis Threat (DBT) rule. Petitioners claim the Commission acted arbitrarily, capriciously, and contrary to law by refusing to include the threat of air attacks in the final revised DBT rule. Petitioners further claim that the Commission violated the National Environmental Policy Act by not considering the risk of an airborne terrorist attack in its Environmental Assessment (EA), and that this risk created a potentially significant impact on the environment, creating the need for a full Environmental Impact Statement (EIS).

**ANALYSIS:** First, the Commission did not depart from an established standard in the DBT rule, but instead elaborated on its interpretation of the rule. Specifically, the Commission determined that the requirements of the DBT rule could exceed the requirements of adequate protection where private forces could reasonably defend against the threat. Citing *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987), the court found that in determining "adequate protection," the Commission should not rely strictly on cost. Rather, it should consider other factors including the nature and extent of the risks involved. Additionally, "adequate protection" does not mean "absolute protection," as the standard allows some level of actual risk. Applying this standard, it was determined that the air-based threats were beyond the scope of the DBT rule and that the Commission was under no obligation to consider passive protective measures. In support of their determination, the Commission proved "adequate protection" by showing that there was (1) active protection against airborne threats provided by other Federal agencies; and (2) there were existing mitigative measures limiting the effects of an aircraft strike. Moreover, because Petitioners identified no effect of the revised DBT rule that could potentially cause "significant degradation of some human environmental factor," no EIS was necessary.

**HOLDING:** The petition was denied, as the Court held that (1) the Commission did not act arbitrarily and capriciously by refusing to include the threat of air attacks in the revised rule; (2) the Commission did not act contrary to law in finding that protection requirements were satisfied without incorporating passive protective measures against air-based attacks; and (3) the Commission did not

abuse its discretion by not considering the risk of airborne terrorist attacks in its environmental assessment.

**IMPACT:** The aftermath of the September 11, 2001 terrorist attacks led to a tightening of security measures spanning everywhere from courthouses to nuclear power plants. Although the Petitioners' argument drew a dissenting opinion questioning why the Commission excluded reports that found that there were insufficient protective methods employed - leaving nuclear plants open to potential attacks - the majority found that the Commission did provide "adequate protection" against air strikes. In the wake of September 11,, national security has become a paramount concern and thus there almost certainly will be future challenges (and probably amendments) to the DBT Rule in the near future.

**Renee v. Duncan,** 573 F.3d 903 (9th Cir. 2009).

**LAW:** 34 C.F.R. § 200.56, enacted by the United States Secretary of Education on December 2, 2002, states in its most pertinent parts that a teacher can be "highly qualified" under the No Child Left Behind Act (NCLB) if the teacher "[i]s participating in an alternative route to certification program," and "demonstrates satisfactory progress toward full certification as prescribed by the State." Alternative route programs are alternatives to the traditional college-based teacher education program routes for obtaining teacher certification.

**FACTS:** Under 20 U.S.C. § 6301, otherwise known as the NCLB, the overarching goal is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." Congress provided that by the end of the 2005-2006 academic year, only highly qualified teachers would instruct core academic classes in states receiving the NCLB funding. Appellants - several California public school students and their parents, joined by two California community organizations - allege that they have been harmed because California school districts have hired thousands of "alternative route" participants, allowed these teachers to be concentrated in low-income and minority areas, and treated the

teachers as highly qualified for reporting and parental notification purposes. In August 2007, Appellants brought an Administrative Procedure Act challenge in the United States District Court for the Northern District of California against the United States Department of Education and Secretary of Education (collectively, the Secretary), alleging that 34 C.F.R. § 200.56 (Regulation) is inconsistent with NCLB, and requesting declaratory and injunctive relief. Both parties moved for summary judgment and, on June 17, 2008, the district court entered an order granting summary judgment in favor of the Secretary. A timely appeal followed.

**ANALYSIS:** Appellants argued that a declaration asserting that the alternative route regulation was “unlawful and void,” would likely cause California to cease treating alternative route participants as highly qualified. However, per *Bennett v. Spear*, 520 U.S. 154 (1997), the meaning of “full certification” is a matter of state law. As a result, California could still determine that teachers participating in alternative routes to certification were highly qualified. Consequently, redressability turned on whether, absent the Regulation, California would consider teachers participating in alternative routes to be highly qualified. The court found that there was no evidence that the revocation of the Regulation would have a coercive effect upon California. As a result, Appellants failed to demonstrate that it was likely that the injury they complained of would be redressed by a decision in their favor.

**HOLDING:** The court held that they need not decide the issue of injury in fact because they concluded that the Appellants failed to show redressability. As a result, the Appellants lacked standing to challenge the regulation. The court vacated the district court’s order for lack of jurisdiction.

**IMPACT:** This decision turned on redressability. Following the decision in *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), the court found that “[a] plaintiff meets the redressability test if it is ‘likely’ - not certain - ‘that the injury will be redressed by a favorable decision.’” Here, the Appellants were unable to prove that declaring the Regulation invalid would “likely” cause California to stop hiring alternative route participants. Though the Appellants’ argument did raise valid questions regarding the state of public

education in California, especially in the inner cities, their case failed at step one, as they could not establish standing to challenge the Regulation.

**River Runners for Wilderness v. Martin**, 574 F.3d 723 (9th Cir. 2009).

**LAW:** 5 U.S.C. § 706(2)(A) states that courts can only hold unlawful and set aside agency actions, findings, and decisions if they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

**FACTS:** River Runners for Wilderness, Rock the Earth, Wilderness Watch, and Living Rivers (Plaintiffs) brought an action against the National Park Service (Park Service) and various individual defendants (Defendants), seeking to set aside a decision of the Park Service that adopted and approved the 2006 Colorado River Management Plan (CRMP), which approved continued use of motorized rafts, generators, and helicopters in the Colorado River Corridor of Grand Canyon National Park. Plaintiffs contended that such motorized activities impaired the wilderness character of the Corridor and that the Park Service’s decision violated its management policies and various federal statutes. Specifically, Plaintiffs asserted that the 2006 CRMP was not only unlawful, but also arbitrary and capricious under the Administrative Procedures Act (APA) because it violated (1) the Park Service’s own policies; (2) the National Park Service Concessions Management and Improvement Act (Concessions Act); (3) the National Park Service Organic Act (Organic Act); and (4) the National Environmental Policy Act (NEPA). The United States District Court for the District of Arizona granted summary judgment in favor of the Defendants. Plaintiffs appealed.

**ANALYSIS:** First, the court addressed Plaintiffs’ claim that the Park Service breached its legal duty by authorizing the continued use of motorized activities in the 2006 CRMP. The Plaintiffs alleged that the 2001 Park Service Management Policies (2001 Policies) were binding because they were written in a mandatory language, were mentioned in the Federal Register, and were found binding in *South Utah Wilderness Alliance v. National Park Service*, 387 F. Supp. 2d



1178 (D. Utah 2005). However, the court found that the 2001 Policies did not prescribe substantive rules and were not promulgated in conformance with the procedures of the APA. As a result, the court did not set aside the 2006 CRMP because it “failed” to comply with portions of the 2001 Policies requiring the Park Service to treat the Colorado River Corridor as “wilderness” or “potential wilderness,” as Plaintiffs alleged.

Second, the court addressed Plaintiffs’ allegation that the 2006 CRMP was arbitrary and capricious because it failed to comply with the requirements of the Concessions Act - governing the granting of commercial concessions within the National Park System. Plaintiffs specifically claimed that the Park Service failed to determine the types and levels of motorized uses, authorized by the CRMP, that were actually necessary and appropriate for public use. However, the court found that the Park Service arrived at its conclusion after considering various alternatives and weighing a significant number of variables. Further, the Park Service even chose an alternative that reduced motorized uses from previous levels. In addition, the court found that the Park Service effectively determined the type and level of traffic on the river that was “necessary and appropriate,” including the type and level of motorized uses.

Third, the Plaintiffs contended that the 2006 CRMP negated the goals and intents of the Organic Act, including providing that the Park Service promote and regulate the use of national parks so that present and future generations can enjoy them. Plaintiffs alleged that the CRMP was arbitrary and capricious because it allowed commercial boaters to use the river at levels that actually interfered with free access by the public and because the CRMP wrongfully concluded that motorized uses did not impair the natural soundscape of the Park. The court dismissed Plaintiffs’ arguments by pointing out that the allocation of river time between commercial and non-commercial user days changed from 66.5% commercial and 33.5% non-commercial under the 1989 CRMP, to 50.4% commercial and 49.6% non-commercial under the 2006 CRMP. The 2006 CRMP even reduced the number of launches and passengers for commercial users, while nearly doubling both categories for non-commercial users. Further, the 2006 CRMP significantly revised the system for private boaters to obtain permits by establishing a lottery system weighted to favor those who have not received a permit in previous years. Additionally, the court found unpersuasive Plaintiffs’

arguments that motorized uses in the Corridor impaired the natural soundscape of the Park. The Park Service relied on studies conducted by noise experts in 1993 and 2003 that included field acoustic measurements and sounds from motorized and non-motorized raft trips, amongst other sounds. Given the evidence presented, the court concluded that motorized uses did not impair the soundscape of the Park in violation of the Organic Act.

Last, Plaintiffs claimed that the 2006 CRMP was arbitrary and capricious because it failed to comply with NEPA. Under NEPA, federal agencies must prepare detailed environmental impact statements for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c). Plaintiffs’ specific allegation was that the Park Service failed to take a close look at cumulative sound impact and failed to use high quality information or accurate scientific analysis. The court disagreed with Plaintiffs’ allegation and found that the Park Service took a hard look at the cumulative impact of noise on the river environment, including noise from river traffic, helicopters, and aircraft overflights.

**HOLDING:** The Plaintiffs failed to satisfy the high threshold required to set aside federal agency actions under the APA. As a result, the court granted the summary judgment motion of Defendants and therefore, denied the summary judgment motions of the Plaintiffs.

**IMPACT:** The Grand Canyon is one of America’s greatest natural treasures. However, environmental degradation has destroyed many of the world’s great natural parks and wonders. As a result, the Plaintiffs strove to eliminate motorized boats, planes, and generators from being used in this Corridor of the Grand Canyon in order to preserve its natural state and beauty. However, the court disagreed with the Plaintiffs’ arguments. The decision strikes a healthy balance, as it: (1) ensures that the elderly, physically disabled, or even everyday people, can enjoy the beauty and splendor of the Grand Canyon on commercial tours via motorized boats, planes, or rafts; (2) increases the opportunity for outdoor aficionados to camp, raft, hike, and explore the Canyon on their own; and (3) enforces current environmental regulations and laws to ensure that the Canyon will not be destroyed by pollution, effluents, or environmental degradation.

**Valentine v. Comm'r Social Sec. Admin.**, 574 F.3d 685 (9th Cir. 2009).

**LAW**: 20 C.F.R. § 404.1520(a)(4)(i)-(v) lays out a sequential, five-step evaluation process to determine disability.

If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity.

The residual functional capacity assessment is used at both steps four and five. The five steps of the process are as follows: (i) at step one, “we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled.” (ii) at step two, the medical severity of the individual’s impairment is considered and if the individual does not have a severe, medically determinable physical or mental impairment that meets the duration requirement in 20 C.F.R. § 404.1509, or a combination of impairments that are severe and meet the duration requirement, he will be found “not disabled;” (iii) at step three, “we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 of this subpart and meets the duration requirement, we will find that you are disabled;” (iv) At step four, “we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled;” and (v) at step five, the final step, we will examine our assessment of your residual functional capacity along with your age, education, and work experience “to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.”

**FACTS**: Jerry Valentine filed an application with the Social Security Administration (SSA) for Social Security disability insurance benefits in March 2005. Valentine alleged disability beginning in 2004. A former member of the Navy, Valentine suffered a combat head injury in Vietnam in 1969. Since the injury, Valentine held several jobs before retiring in March 2004. Valentine

complained of post-traumatic stress disorder (PTSD) and a combination of depression and sleep deprivation, along with degenerative joint disease in his right shoulder and left knee. The PTSD resulted from Valentine's head injury in Vietnam, but it appeared to have worsened significantly in the wake his brother's death from a head injury in the summer of 2000. Valentine received treatment for the PTSD and for sleep disturbance and persistent nightmares at a Veterans Administration Medical Center from September 2000 through March 2006. In 2001, Valentine began sleep therapy treatment with Dr. Lynn M. Van Male. At the time, Valentine reported that he got a good night's sleep about three days a week. Valentine's performance at work was erratic, as he received several marginal performance ratings on his annual job review in February 2002. As a result, Dr. Van Male sent Valentine to undergo a neuropsychological assessment. The overall results indicated normal cognitive abilities. However, other tests indicated impaired performance with respect to attention, working memory, and complex psychomotor function. All the while, Valentine tried to increase his disability rating, which then stood at 30%, from the Department of Veterans Affairs (VA). In a letter to the VA written in May 2002, Dr. Van Male stated that while Valentine was able to hold down his job, she worried about his ability to maintain employment "given his current rate of functional decline." The VA raised his disability rating to 70%. Though his difficulties persisted during 2003, Valentine's performance review in January 2003 was positive; his ratings being in the "acceptable" to "commendable" range. He received positive reviews in February from his supervisor, who praised Valentine's attitude and noted improvement in his work product. After his retirement, Valentine's condition continued to improve as he exercised and took up projects to keep busy. He even stopped regular visits with Dr. Van Male in November 2004. Valentine then requested another increase in his disability rating from the VA. Dr. Leslie Carter interviewed him in October 2004 and found that Valentine's nightmares and sleep deprivation were "extremely disabling." Dr. Carter, however, was under the impression that Valentine had ceased working because he was about to be fired. Initially, the VA did not act, despite Dr. Carter's report. After Dr. Van Male sent further letters in 2005 and 2006, the VA ultimately raised Valentine's disability rating to 100%. In addition to the PTSD, Valentine sustained two physical injuries in 2005: torn

cartilage in his shoulder and damage to his left knee. He underwent surgery for both injuries. In September 2005, two months before surgery on his knee, Valentine took a physical examination, which did not suggest any significant physical impairment. Several psychologists, including Dr. Peter LeBray, reviewed Valentine's medical record on behalf of the SSA. The ALJ considered this evidence, along with the rest of Valentine's file, at a hearing in March 2006. Ultimately, the ALJ decided that Valentine was not disabled, denying him the benefits requested. The Appeals Council declined review. In response, Valentine filed a civil action in the district court to obtain judicial review of the agency's decision. The district court affirmed the denial of benefits. Valentine appealed.

**ANALYSIS:** Valentine's first objection concerned the residual functional capacity determination (RFC) made by the ALJ. The RFC is a summary of what the claimant is capable of doing: for example, how much weight the claimant can lift. In the RFC, the ALJ concluded that Valentine possessed the residual functional capacity "to perform a limited range of medium exertion work." Valentine specifically contended that the ALJ did not take account of all his limitations in fashioning the RFC. However, the court found that the limitations and observations made by Doctors LeBray and Storzbach appeared almost verbatim in the actual RFC. Thus, it could not be said that the ALJ ignored evidence of Valentine's impairments when she compiled his RFC.

Second, Valentine argued that the ALJ improperly rejected other evidence of the extent of his impairments. Valentine claims that the ALJ should not have rejected Dr. Van Male's testimony, his own testimony, and his wife's testimony. However, the court rejected Dr. Van Male's testimony because it was contradictory. Dr. Van Male had reported that Valentine was unemployable, but, Dr. Van Male's own "treatment progress reports" reported that Valentine demonstrated improved functioning at work and had received encouraging comments from company officials. The court also rejected the testimonies of Valentine and his wife because the ALJ provided clear and convincing evidence that served to contradict Valentine's physical impairment complaint. Specifically, the ALJ noted that Valentine "'demonstrated better abilities than he acknowledged in his written statements and testimony' and that his 'non-work activities...[were] inconsistent with the degree of

impairment he allege[d].” The ALJ went so far as to note the fact that Valentine exercised and undertook several community activities -- including gardening with his wife – which proved that he was not disabled.

Lastly, Valentine contends that the ALJ should have accepted the VA’s rating declaring he was 100% disabled. The ALJ found that the VA’s determination “was not based on a comprehensive evaluation of the evidence available.” In other words, the ALJ highlighted the fact that the VA rested on an opinion that the ALJ rejected. Additionally, the ALJ received additional evidence that undermined the evidence that the VA actually had. The Court concluded that the acquisition of new evidence was a valid reason for disregarding the VA’s disability rating.

**HOLDING:** Judgment of the district court was affirmed.

**IMPACT:** The ALJ was able to wade through the numerous facts and circumstances and separate the valid medical reports from the false ones in order to come to a just decision. Also, the ALJ meticulously went through the five-step process to correctly determine that Valentine was not disabled. Meticulous attention to detail in these cases will ensure that those who truly deserve disability benefits will receive them, while keeping those who do not deserve them from unjust enrichment.

#### SUPREME COURT OF CALIFORNIA

**Morongo Band of Mission Indians v. State Water Res. Control Bd.**, 199 P.3d 1142 (Cal. 2009).

**LAW:** California Government Code section 11430.30, also known as California’s Administrative Procedure Act (Act), only requires the internal separation of prosecutorial and advisory functions on a strict case-by-case basis. In other words, the Act does not prohibit an agency employee who acts in a prosecutorial capacity in one case from concurrently acting in an advisory role in an unrelated case.

**FACTS:** The Morongo Band of Mission Indians (Morongo Band), a federally recognized California Indian tribe, is the current

holder of a license to divert water, for irrigation purposes, from springs arising in Millard Canyon in Riverside County. In April 2003, the State Water Resources Control Board (Board) issued a notice of proposed revocation of that license on the grounds that the Morongo Band, or prior holders of the license, failed to beneficially utilize the water for an extended period and had violated license terms by using the water for unauthorized purposes. The Morongo Band then requested a hearing to contest the proposed license revocation. The Board subsequently issued a notice of public hearing, which identified staff counsel Samantha Olson as a member of the enforcement team prosecuting the case. Olson was not only acting in a prosecutorial capacity as a member of the enforcement team, but was also acting in an advisory capacity as a member of the hearing team in a separate, unrelated matter before the Board. After considering the materials submitted by the parties, the trial court granted the petition for writ of mandate compelling Olson's disqualification. The Board appealed, and the court of appeal affirmed the trial court's judgment granting the writ. The court granted the Board's petition for review.

**ANALYSIS:** The Morongo Band argues that that when the agency attorney (Olson) concurrently advised the adjudicator in a separate, albeit unrelated matter, the risk that the agency adjudicator would be biased in favor of the prosecuting agency attorney was of a magnitude sufficient to overcome the presumption of impartiality. However, the Morongo Band presented no evidence that the Board, or any of its members, was actually prejudiced against it. The court relied heavily upon *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 40 Cal. 4th 16 (2006). For example, the court in *Alcoholic* went on to highlight that the Act specifically holds that the agency head is free to speak with anyone in the agency and to solicit and receive advice from whomever he or she pleases, except for the personnel who served as adversaries in a specific case. In the instant case, the court specifically singled out two reasons to rule against the court of appeals decision: (1) there was no evidence that Olson, or any other agency staff attorney, ever acted in both advisory and prosecutorial capacities in this or any other single adjudicative proceeding; and (2) there was no evidence that the Board ever regarded Olson as its sole or primary legal adviser. Specifically, the undisputed evidence showed that Olson

advised the Board regarding only one matter – one unrelated to the Morongo Band's license revocation proceeding – and that she was just one of a group of staff attorneys from which the Board could obtain legal advice.

**HOLDING:** It did not violate license holder's right to due process for the prosecuting agency attorney to simultaneously serve as an advisor to the Board on an unrelated matter. The decision reversed the Court of Appeal's judgment.

**IMPACT:** The Supreme Court of California's decision effectively overruled the decision in *Quintero v. City of Santa Ana*, 114 Cal. App. 4th 819 (Cal. Ct. App. 2003). The *Quintero* court held that the internal separation of functions on a case-by-case basis was insufficient to satisfy the constitutional requirements for due process of law, and that an administrative agency's internal separation of functions must be complete not only as to each individual case, but as to all cases, related or unrelated, that are pending before the agency at any given point in time. In this case, the court was able to differentiate the specific circumstances to find that there was no risk of bias present. The court made it clear that the presumption of impartiality could only be overcome by presenting specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.



